Thavamani Deve a/p Govindasamy v N Sugumaran a/l Neelmehan & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–474–95
ABDUL WAHAB PATAIL JC
31 OCTOBER 1995

Family Law *— Children — Custodianship — Application for — Factors to be considered — Whether presumption that child is better off with mother than father is a decisive factor — Whether other factors relevant to the welfare of the child must be considered — Whether onus is on applicant to show that she offers significant improvements to welfare of child if she obtains custody*

This is an application for custody by the mother of a two-year-old child. The first defendant is the father of the child while the second defendant is the grandmother of the child. When the child was about two months old, the applicant left for Taiping leaving behind the child in the care and custody of the defendants up to this day.

Held, denying the application with a further order that the applicant be given reasonable access to her child:

(1) The term 'parent' is not defined in the Guardianship of Infants Act 1961 ('the Act'). That it means the natural father or mother is clear since the Act makes no reference to or recognizes any other form of relationship. Hence, the grandparents or uncles and aunts have no special claim or rights as the natural parents; although the fact of blood relationship may be grounds for consideration in weighing applications against persons less closely related or not related at all. In taking consideration of the wishes of both parents here, the first defendant is as much a parent as the applicant (see p 199F–G).

(2) There is generally a presumption that a young child is better off with its mother than father. It is, however, only a presumption and not on its own necessarily a decisive factor. It must be weighed together with all other factors relevant to the question of the primary consideration, which is the welfare of the child (see p 200A–B).

(3) The onus is on the applicant to show that the applicant offers such significant improvements or advantages to the welfare of the child as to warrant a change of custody and justify the disturbance from change of environment that such a custody order would visit upon the child, particularly one of very tender years. The applicant has failed to provide evidence in her application that the welfare of the child will be better looked after if she were given custody. Hence, the status quo should remain (see p 200D–F).

[**Bahasa Malaysia summary**

Ini ialah satu permohonan seorang ibu untuk jagaan anaknya yang berumur dua tahun. Defendan pertama ialah bapa budak itu sementara defendan kedua adalah nenek budak itu. Ketika budak itu berumur dua bulan, pemohon telah balik ke Taiping dan meninggalkannya di bawah pemeliharaan dan jagaan kedua defendan itu sehingga ke hari ini.

Diputuskan, menolak permohonan itu dengan arahan lanjut supaya pemohon diberi akses yang munasabah kepada anaknya:

(1) Terma 'parent' tidak ditakrifkan di dalam Akta Penjagaan Budak 1961 ('Akta itu'). Bahawa ia bermaksud bapa atau ibu sebenar adalah jelas kerana Akta itu tidak merujuk kepada atau mengiktirafkan perhubungan yang selain daripada itu. Dengan ini, datuk dan nenek atau pakcik dan makcik, tidak mempunyai tuntutan yang istimewa atau hak sebagai ibubapa sebenar; walaupun fakta tali persaudaraan boleh dijadikan alasan untuk dipertimbangkan di dalam permohonan terhadap orang yang tidak mempunyai tali persaudaraan yang rapat atau tiada persaudaraan langsung. Dalam mengambil kira kehendak kedua-dua ibu bapa di sini, defendan pertama adalah bapa sebenar sebagaimana pemohon juga adalah ibu sebenar (lihat ms 199F–G).

(2) Secara amnya, terdapat anggapan bahawa budak yang kecil adalah lebih sesuai bersama ibunya daripada bapanya. Akan tetapi ini hanyalah satu anggapan dan tidak dengan sendirinya menjadi satu faktor penentuan. Ia mesti dipertimbangkan dengan faktor-faktor lain yang relevan kepada soalan pertimbangan utama, iaitu kebajikan kanak-kanak tersebut (lihat ms 200A–B).

(3) Pemohon mempunyai beban untuk menunjukkan bahawa dia dapat memberi faedah-faedah atau perbaikan yang ketara kepada kebajikan budak itu untuk menyokong pertukaran hak jagaan dan menjustifikasikan gangguan dari pertukaran persekitaran budak itu kerana sesuatu perintah penjagaan itu akan menjejaskan budak itu, terutamanya pada umur yang sangat muda. Pemohon telah gagal membuktikan di dalam permohonannya bahawa kebajikan budak itu akan dijaga dengan lebih baik jika dia diberi hak jagaan. Dengan itu, status quo patut dikekalkan (lihat ms 200D–F).]

Notes

For cases on custodianship of children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1766–1831.

Legislation referred to

Guardianship of Infants Act 1961 ss 3, 5, 6, 11, 88

Low Kian Boon (Legal Aid Bureau) for the plaintiff.
N Subramaniam (*Lawrence Joseph and Mahalingam & Co*) for the defendants.

Abdul Wahab Patail JC: This is an application for custody of a two-year-old child by his mother.

The applicant is the mother of a child Barath a/l Sugumaran born on 25 January 1994, the result of an association with the first defendant. The second defendant is the mother of the first defendant. There is no dispute that the first defendant is the father of the child, or that the second defendant is the grandmother of the child.

The applicant had stayed with the defendants in the latter's house for about two months after the child was born. She had then left to return to Taiping, leaving behind the child in the care of the defendants to this day.

From Taiping, the applicant had telephoned the second defendant several times to inquire about her child. Between March and July 1995, the applicant had visited her child in the defendants' house. The applicant, however, was denied access when the first defendant was admitted to Pusat Serenti for a period of two years. The first defendant had escaped and is now a fugitive.

After July, when the applicant wanted to see her child, she was refused access by the second defendant. The applicant became angry and broke a flower pot in the second defendant's house. She had made a report of not being allowed to see her child in September 1995.

The applicant further alleges:

(a) due to a caesarian birth and slow recovery she was forced to stay with the defendants. The second defendant did not take care of her and asked the applicant's mother to take the applicant back to Taiping. That is why she left the child with the second defendant;

(b) the first defendant is a drug addict to such an extent he was unable to find a job, did not provide for the applicant, and he even smoked drugs in front of her; and

(c) that in February 1995, she had gone to the second defendant's house to see her child but instead she was beaten by the second defendant and a friend of the first defendant.

It was further argued that the second defendant has no locus standi as she is not the mother-in-law of the applicant, and therefore the applicant has the right of custody. The defendants opposes the application, and alleges:

(a) before the child was born she had mentioned her intention to surrender her child to her sister in Kuala Kangsar, and that she does not intend to look after the child. Her sister although married for five years is childless, and in the original appearance on 4 September 1995 had mentioned the child will be looked after by the sister;

(b) that during pregnancy she had not wanted the child, indeed wanted the unborn child to die;

(c) the applicant tried to injure the child after it was born; and

(d) that the applicant is not in a situation to look after the child:

(i) the address she has given is the house of one Supramaniam a/l Narayanan, who is married with nine children staying at that address;

(ii) there is no evidence where she stays, whether in a rented room or a house;

(iii) she works in the Selayang wholesale market and has no fixed hours;

(iv) she is prone to violence and is rough of language and manners; and

(v) there is no allegation that the child is in any way abused or ill-treated by the defendants, or that the second defendant is unsuitable. The second defendant is a 56-year-old housewife whose husband is an odd-job labourer, with sons who are working, and two adopted children, 12 and 20 years of age. The child has been taken for innoculations etc. Instead, a change of custody would uproot the child.

The applicant's reply is, briefly:

(a) the applicant will take the child back to Taiping. The applicant will look for a job, and she will be assisted by her sister to look after the child, and the welfare of the child is ensured under the plaintiff's mother;

(b) that her bouts of violence was a result of the psychological pressure in not having her child;

(c) that *she let her child drop* is not true. If true there should be a medical report;

(d) there is no evidence that the applicant is abusive to children; and

(e) under s 88 Guardianship of Infants Act 1961, the presumption is for the mother to have custody, and cases mentioned by the defendants are not applicable as they are in disputes between father and mother for custody.

With regard to the legal aspects of this application, the starting point is the Guardianship of Infants Act 1961 ('the Act'). Section 5 of the Act provides:

> Subject to s 10, the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

Hence, normally the father is the guardian of the child, with the associated rights and duties set out in s 3 of the Act:

> The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

The mother only becomes guardian under the terms of s 6 as follows:

> Subject to s 10, where an infant has no father living, the mother of the infant shall be the guardian of his person and property:
>
> Provided that the court or a judge may appoint some other person to be the guardian of the infant's person and property, or either of them to act jointly with the mother.

The father, as guardian, would normally have custody of the child, unless the mother can show the father is no longer alive; or if he is still alive, grounds why she should have custody. In making any order under the powers conferred upon it by the Act, the court or judge is charged by s 11 as follows:

> The court or a judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

In cases where parents fight over custody, it is common to throw allegations at one another. However, whether one parent has wronged the other is not the concern in deciding what is in the best interests of the welfare of the child. It is not the role of the court or judge to reward or punish either parent by awarding custody to one parent or the other. The primary concern is the welfare of the child. The court is obliged only to consider the wishes of the parents.

The term 'parent' is not defined in the Act. That it means the natural father or mother is clear since the Act makes no reference to or recognizes any other form of relationship. Hence, the grandparents or uncles and aunts have no special claim or rights as the natural parents; although the fact of blood relationship may be grounds for consideration in weighing applications against persons less closely related or not related at all. In taking consideration of the wishes of the parents, the first defendant is as much a parent as the applicant.

It is clear in this case, no matter into whose custody the child is given, the grandparents and relatives play a role in helping to look after the child. The first defendant who is the father relies on the second defendant as grandmother to look after the child. The applicant also relies on her mother and her sister to help look after the child. While it is averred the first defendant has no job and is a fugitive, the applicant also speaks of returning to Taiping and looking for a job. Hence, on the question of who will actually look after the child, and having a job, both parties are in roughly similar position.

There is generally a presumption that a young child is better off with its mother than father. It is, however, only a presumption and not on its own necessarily a decisive factor. It must be weighed together with all other factors relevant to the question of the primary consideration, which is the welfare of the child.

From the point of view of the welfare of the child, the familiarity and certainty of what the child is used to now, living with the first and second defendant is preferable to the unfamiliarity and uncertainty of life in Taiping. The applicant in making her application failed to show in certain terms what kind of living conditions the child will have in Taiping. There is indeed no evidence that the child is not well looked after or cared for by the defendants. Although the father is an alleged drug addict, there is no evidence he seeks to make his child a drug addict. The child in fact had always stayed with the defendants, who are the natural father and the paternal grandmother respectively. The child is living in the house the father ordinarily resides, and it cannot be said he has no custody. Nothing has been put before the court which can be compared with to show that the welfare of the child is better attended to in Taiping with the mother. In such circumstances, the status quo should remain.

This decision is not a condemnation of one party or the other. Indeed, it is to reinforce the view that in applications such as this, the onus is on the applicant to show that the applicant offers such significant improvements or advantages to the welfare of the child as to warrant a change of custody, and justify the disturbance from change of environment that such a custody order would visit upon the child, particularly one of very tender years. This order that the application is denied is really one for the status quo to remain because the applicant has failed to provide evidence in her application that the welfare of the child will be better looked after if she is given custody.

Hence, the application is denied, with the further order that the applicant be given reasonable access to her child. Regarding the fact of the current guardianship and therefore custody of the child being in the hands of the father, a further order is made that the grandmother be appointed as additional guardian which the court feels better safeguards the welfare of the child.

Order accordingly.

Reported by Sally Kee Seok Meng